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No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1968

ARMAND A. MAYER, PETITIONER

v.

ARNOLD ORDMAN, AS GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ARTHUR A. HORowitz,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 405

ARMAND A. MAYER, PETITIONER

v.

ARNOLD ORDMAN, AS GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The opinion and judgment of the district court dismissing the complaint (Pet. App. 11-16) is not officially reported. The opinion of the court of appeals (Pet. App. 17-23) is reported at 391 F. 2d 889.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1968 (Pet. App. 24), and a motion for

reconsideration was denied on April 30, 1968 (Pet. App. 25). On July 10, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari until August 14, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the action of the General Counsel of the National Labor Relations Board in declining to issue an unfair labor practice complaint is judicially reviewable.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition, pp. 3-4.

STATEMENT

On May 13, 1966, petitioner filed an unfair labor practice charge with the Regional Office of the National Labor Relations Board in Detroit, Michigan (Board Case No. 7-CA-5562). He alleged that Earl T. Smith, Inc. had violated Section 8(a)(3) and (1) of the National Labor Relations Act by refusing to employ him because prior to his discharge in August 1964 he had filed numerous grievances (Pet. App. 32-34). Upon investigation, the Regional Director found that Mayer had previously filed a charge with the

Board (Board Case No. 7-CA-5031) alleging that the 1964 discharge was unlawful for the same reason; that the Director had refused to issue a complaint because an arbitration committee empowered to adjudicate such disputes under the collective bargaining contract had determined that Mayer was discharged not because he had filed grievances, but for good cause; and that on appeal the General Counsel of the Board had sustained the Regional Director's decision (Pet. App. 28-29, 30-31, 33). Since the validity of Mayer's discharge had been determined in the earlier arbitration proceeding, and there was no showing that that proceeding was irregular, the Regional Director declined to issue a complaint on the 1966 charge (Pet. App. 32-35). On appeal by Mayer, this decision was sustained by the General Counsel (Pet. App. 36-38).

Petitioner Mayer brought this suit against the General Counsel in the United States District Court for the Eastern District of Michigan, seeking a declaration of his rights under the National Labor Relations Act and a mandatory injunction to compel the General Counsel to investigate further the merits of his 1966 unfair labor practice charge. The district court dismissed the complaint for lack of jurisdiction over the subject matter (Pet. App. 11-16). The court of appeals dismissed Mayer's appeal as "frivolous and entirely without merit" (Pet. App. 17-18).

ARGUMENT

Section 10(b) of the Act (29 U.S.C. 160(b)) vests the Board with wide discretion in the issuance of un-

fair labor practice complaints.[1] Section 3(d), in turn, channels this discretionary power to the General Counsel of the Board—providing that he shall have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10." As this Court recently stated, "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. 171, 182.[2] Since the action of the court below is in accord with this settled authority and clearly correct, further review is unwarranted.

Petitioner contends that the General Counsel failed to make a "full" investigation by erroneously relying on the result of the arbitration proceeding. It is clear, however, that the Board has discretion to accommodate its processes to the processes of arbitration; indeed, such an accommodation effectuates the policies of the Act. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 270-272; *Spielberg Mfg. Co.*, 112 NLRB

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[1] *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18.

[2] See also, *Dunn* v. *Retail Clerks, Local 1529*, 307 F. 2d 285 (C.A. 6); *Balanyi* v. *Local 1031, I.B.E.W. & National Labor Relations Board*, 374 F. 2d 723 (C.A. 7); *National Labor Relations Board* v. *Lewis*, 310 F. 2d 364, 366 (C.A. 7); *United Electrical Contractors Ass'n* v. *Ordman*, 366 F. 2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026; *Division 1267, Amalg. Ass'n, etc.* v. *Ordman*, 320 F. 2d 729 (C.A. D.C.); *Retail Store Employees Union Local 954* v. *Rothman*, 298 F. 2d 330, 331-332 (C.A. D.C.); *Bandlow* v. *Rothman*, 278 F. 2d 866 (C.A. D.C.), certiorari denied, 364 U.S. 909; *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187, 188 (C.A. D.C.), certiorari denied, 345 U.S. 930.

1080. Moreover, contrary to petitioner's contention (Pet. 8), since the Regional Director found that the employer refused to rehire petitioner for the same reasons it had earlier discharged him (Pet. App. 32-33), the arbitration proceeding was not unrelated to the question presented in the later charge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ARTHUR A. HOROWITZ,
Attorney,
National Labor Relations Board.

SEPTEMBER 1968.

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